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July 28, 2005

Chairman Kevin Martin Federal Communications Commission The Portals, TW-A325 445 12<sup>th</sup> Street SW Washington, DC 20554

Re: *Ex Parte* Presentation

Wireline Broadband Proceeding (CC Dkt. Nos. 02-33, 98-10, 95-20)

#### Dear Chairman Martin:

EarthLink, Inc. ("EarthLink") looks forward to working with you, the other Commissioners, and the Commission staff in the ongoing *Wireline Broadband* proceeding to develop rules for DSL-based services that will benefit the American economy and provide for continued technological innovation enhancing the lives of all Americans. As one of the nation's largest independent ISPs, offering both broadband and narrowband Internet services across the country, EarthLink knows the gravity of the issues in this proceeding: each EarthLink and independent ISP customer affirms the value and choice that those ISPs provide to all Americans.

The public interest goals of an open and participatory Internet, consumer access to content and services offered by Internet providers without interference from transport providers, and plain statutory construction of the Act's definitions and terms are why the FCC has repeatedly held that incumbent LEC DSL services should be offered on a common carrier basis to competing ISPs (see, Att. II). A goal of regulatory parity or providing "perfect" competition for the incumbent LEC industry is not one of the goals of the Communications Act or the Telecommunications Act of 1996 and should not be a basis on which the Commission makes this important decision (see, Att. IV). Given that the core broadband issue facing the nation is the value of the broadband experience to the public and the utility of broadband applications and that FCC data demonstrate lack of broadband access competition (see, Att. VI), now is not the time for the Commission to reverse course and strip long-held guarantees of connectivity between ISPs and consumers across the incumbent LEC broadband platform. Even if such reversals are accomplished, then the Internet service industry tumult is not over because the process of discontinuance of the existing BOC Title II DSL services requires the Commission to face the obligations of Section 214 of the Communications Act and reconcile the facts of today's marketplace – lack of alternative broadband access platforms available for ISPs (see, Att. VI).

The Supreme Court's *Brand X* decision certainly does not compel the Commission to take away the existing ISP access rights (see, Att. I). To the contrary, *Brand X* affirmed the

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Commission's differential treatment of cable operators and incumbent LECs as reasonable: "the Commission provided a reasoned explanation for treating cable modem service differently from DSL service." Instead, the Court went out of its way to clarify that it was not weighing in on the *Wireline Broadband* proceeding: "we express no view on how the Commission should, or lawfully may, classify DSL service."

Moreover, the record shows a significant array of opposition to DSL reclassification, including at least eight State regulatory commissions, the U.S. Secretary of Defense, the National Association of Regulatory Utility Commissioners, several consumer groups, the competitive local exchange carrier industry, the competitive Internet service provider industry, competitive VOIP providers, and even the rural incumbent local exchange carriers (until a few days ago). All opposed this reclassification because it would create a number of serious problems, including: loss of law enforcement access to networks under CALEA (see Att. III); problems of national defense security; inhibiting IP-based telephony choices for consumers and investment in such companies; frustration of state regulatory work on local competition; loss of consumer access to ISP choice; potential erosion of competitive LEC rights to UNE access; consumer loss of Communications Act privacy protections; exacerbation of existing problems of vertical integration in the Internet service markets; and problems of proper cost allocation and cross-subsidies.

Pursuant to the Commission's *ex parte* rules, one copy of this memorandum is being filed electronically in each of the above-referenced dockets for inclusion in the public record. Please do not hesitate to call me if you have any questions.

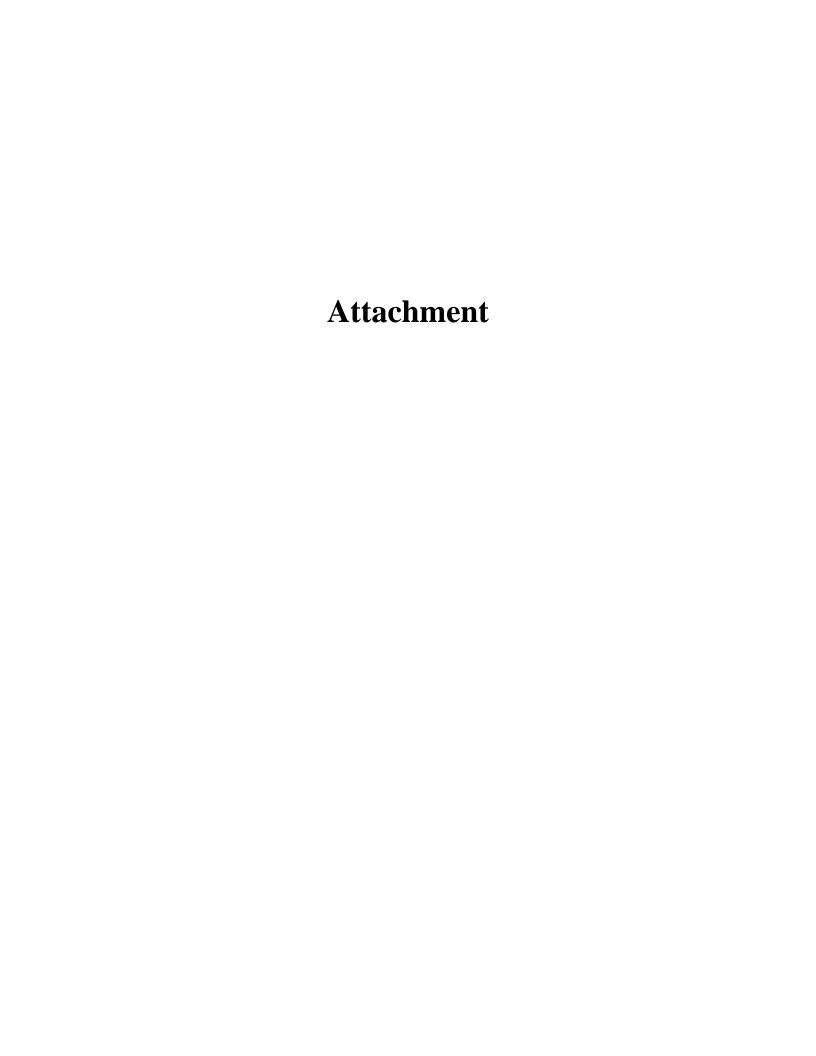
Respectfully submitted,

/s/

Mark J. O'Connor Counsel for EarthLink, Inc.

### CC (via email):

Commissioner Kathleen Abernathy
Commissioner Jonathan Adelstein
Commissioner Michael Copps
Daniel Gonzalez
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Scott Bergmann
Jessica Rosenworcel
Samuel Feder
Thomas Navin



# I. Brand X Provides No Basis to Overturn the Settled FCC Precedent of the Incumbent LECs' Obligation to Offer Wholesale DSL to Competing ISPs as Telecommunications Services.

- *Brand X* affirmed the FCC's decision to treat DSL differently from cable modem service: "the Commission provided a reasoned explanation for treating cable modem service differently from DSL service." *National Cable & Telecommunications Ass'n v. Brand X*, 125 S. Ct. 2688, p. 60-61 (2005).
- Brand X noted that under the FCC precedent, "DSL carriers [have a] 'continuing obligation' to offer their transmission facilities to competing ISPs on a nondiscriminatory basis." Brand X, 125 S. Ct. at 61 (citing, In the Matters of Deployment of Wireline Services Offering Advanced Telecommunications Capability, Memorandum Opinion and Order and Notice of Proposed Rulemaking, 13 FCC Rcd, 24011, ¶ 37).
- *Brand X* Court expressly declined to apply the case to the FCC's DSL service regulation: "we express no view on how the Commission should, or lawfully may, classify DSL service." *Brand X*, 125 S. Ct. at 64.

### II. The FCC Has Long Held That Incumbent LEC DSL Service is a Telecommunications Service.

■ The 1998 Advanced Services MO&O held that advanced services offered by incumbent LECs, including DSL "... are telecommunications services... Moreover, to the extent that such a service is offered for a fee directly to the public, it is a 'telecommunications service.'"

The Advanced Services MO&O also held that:

"Incumbent LECs have proposed, and are currently offering, a variety of services in which they use xDSL technology and packet switching to provide members of the public with a transparent, unenhanced, transmission path. Neither the petitioners, nor any commenter, disagree with our conclusion that a carrier offering such a service is offering a 'telecommunications service'...BOCs offering information services to end users of their advanced service offerings, such as xDSL, are under a continuing obligation to offer competing ISPs nondiscriminatory access to the telecommunications services utilized by the BOC information services."

Deployment of Wireline Services Offering Advanced Telecommunications Capability, Memorandum Opinion and Order, 13 FCC Rcd. 24011, ¶¶ 35-37 (1998).

 2001 CPE/Enhanced Services Unbundling Order held DSL services are subject to Title II of the Act:

"The internet service providers require ADSL service to offer competitive internet access service. . . .In addition, we would view any such discrimination in pricing, terms, or conditions that favor one competitive enhanced service provider over another or the carrier, itself, to be an unreasonable practice under section 201(b) of the Act."

*Policy and Rules Concerning the Interstate, Interexchange Marketplace*, Report and Order, 16 FCC Rcd. 7418, ¶ 46 (2001).

■ The 1999 *Advanced Services Second R&O* found that:

"bulk DSL services sold to Internet Service Providers . . . are telecommunications services, and as such, incumbent LECs must continue to comply with basic common carrier obligations with respect to these services. These obligations include: providing such DSL services upon reasonable request; on just, reasonable, and nondiscriminatory terms; and in accordance with all applicable tariffing requirements."

Deployment of Wireline Services Offering Advanced Telecommunications Capability, Second Report and Order, 14 FCC Rcd. 19237, ¶ 21 (1999).

■ The 1999 CALEA Second Report and Order determined that

"Where facilities are used to provide both telecommunications and information services. . . such joint-use facilities are subject to CALEA in order to ensure the ability to surveil the telecommunications services. For example, digital subscriber line (DSL) services are generally offered as tariffed telecommunications services, and

therefore subject to CALEA, even though the DSL offering often would be used in the provision of information services."

*In the Matter of Communications Assistance for Law Enforcement Act*, Second Report and Order, 15 FCC Rcd. 7105, ¶ 27 (1999).

### III. Reclassification of DSL Would Endanger Homeland Security (CALEA)

- The statutory requirements of CALEA apply only to "telecommunications carriers." CALEA expressly excludes from the "telecommunication carrier" definition "persons or entities . . . insofar as they are engaged in providing information services." 47 U.S.C. § 1001(8)(C)(i). If the FCC reverses the classification of ILEC wholesale DSL as a "telecommunications service" (i.e., by reclassifying it as private carriage), the FCC would undermine the only statutory basis for law enforcement to obtain the ILECs' assistance as currently provided for under CALEA.
- Strained interpretations of the relevant statutory terms under CALEA will only yield legal instability and delays for law enforcement. The "information service" definition in both the Communications Act and CALEA are virtually identical and the FCC cannot conclude a provider is an information service under one statute and not the other. 47 U.S.C. § 1001(6), 47 U.S.C. § 153(20). Absent an extraordinary showing that different meanings were intended, identically defined terms in statutes governing the same activity must be given the same meaning for both statutes. See, e.g., Northcross v. Board of Education, 412 U.S. 427, 428 (1973).
- CALEA legislative history confirms the plain statutory language. Congress did not intend for CALEA to apply to providers of information services, including Internet service providers: "excluded from coverage [by CALEA] are all information services, such as Internet service providers or services such as Prodigy and America-On-Line." (103<sup>rd</sup> Cong., 2d Sess. H.R. 103-827 (1), at 20 (1994)); "[w]e are excluding [computer service companies from CALEA], and for a couple of reasons: one, to narrow the impact and focus of the legislation. We could have incorporated it in there, as we did in the proposal 2 years ago, which was rejected out of hand." (Freeh Testimony, Joint Hearings Before the Subcommittee on Technology and the Law of the Senate Judiciary Committee and the Subcommittee on Civil and Constitutional Rights of the House Judiciary Committee, Mar. 18 and Aug. 11, 1994 (S. Hrg. 103-1022), at 49-50).
- If the FCC declares that ILECs must not use and provide DSL as a telecommunications service, then ILECs are free from CALEA obligations where, according to the FCC, the ILECs are not "telecommunications carriers."

# IV. Deregulation of DSL Services for the Sake of Regulatory Parity Among Thriving Competitors is Not A Legitimate Goal Under the Communications Act.

• In the D.C. Circuit's seminal *Hawaiian Telephone Co.* case, the hazards of Commission action for the sake of parity between competitors were laid out plainly:

"Competition as a factor might have some relevance to the FCC decision, if competition had been shown to be of benefit to the public on the communications routes in question. Yet it is all too embarrassingly apparent that the Commission has been thinking about competition, not in terms primarily as to its benefit to the public, but specifically with the object of equalizing competition among competitors. This is not the objective or role assigned by law to the Federal Communications Commission. As a result of focusing first on competitors, next on competition, and then on the public interest, the FCC . . . has not met its statutorily imposed duty."

Hawaiian Telephone Co. v. FCC, 498 F.2d 771, 775-776 (D.C. Cir. 1974) (emphasis added).

- The Telecommunications Act of 1996 does not set a regulatory parity goal for the FCC. Indeed, the Senate version of the Telecommunications Act, as reported by the Senate Commerce Committee and as adopted by the Senate, contained a Section 305 entitled "Regulatory Parity." Ultimately, however, Congress eliminated regulatory parity as a goal of the Act by rejecting this portion of the legislation in the final bill approved by both houses of Congress and signed by then-President Clinton. S. 652, "Telecommunications Competition and Deregulation Act of 1995," § 305, as reported in S. Rpt. No. 104-23.
- Neither has Congress implicitly endorsed regulatory parity as a goal of the Communications Act. Indeed, the structure of the 1996 Act imposes distinct obligations on providers even where competitive overlaps may occur. In those few instances where Congress has set regulatory parity of competitors as an FCC goal, it has done so explicitly and has imposed limits on the scope of FCC decisions made for the sake of regulatory parity. *See e.g.*, 47 U.S.C. § 332(c) n.1 *citing* § 6002(d)(3)(B) of the Omnibus Budget Reconciliation Act of 1993.
- The FCC agrees: "we reject the proposal, and all others made by the BOCs, of parity for parity's sake. . . . the Communications Act does not require parity between competitors as a general principle" and "[d]espite joint petitioners' claims about regulatory parity, the Communications Act requires us to focus on competition that benefits the public interest, not on equalizing competition among competitors." *In re Applications of Craig O. McCaw and AT&T*, Memorandum Opinion and Order, 9 FCC Rcd. 5836 (1994), *aff'd*, *SBC v. FCC*, 56 F.3d 1484 (D.C. Cir. 1995); *see also*, Memorandum Opinion and Order on Reconsideration, 10 FCC Rcd. 11786, 11792-93 (1995).
- The Commission's inquiry in the *Wireline Broadband* proceeding should not be whether incumbent LECs and cable operators are subject to identical regulation they are not but, rather, whether ISP access rights under the Commission's *Computer Inquiry* precedent continue to advance the interests of consumers.

# V. Section 214 of the Communications Act Does Not Permit the Commission to Reclassify Wholesale DSL As Private Carriage Service

- Under Section 214 of the Communications Act, discontinuance of a common carrier service requires the carrier to "obtain[] from the Commission a certificate that neither the present nor future public convenience and necessity will be adversely affected thereby." 47 U.S.C. § 214(a).
- "Common carrier" carries the same meaning as a provider of a "telecommunications service." In *Virgin Islands*, the D.C. Circuit affirmed the Commission's holding that "the definition of 'telecommunications services' in the 1996 Act was 'intended to clarify that telecommunications services are common carrier services." *Islands Tel. Corp. v. FCC*, 198 F.3d 921, 926 (D.C. Cir. 1999) (citing *Cable & Wireless, PLC*, 12 FCC Rcd. 8516, ¶¶ 14-15 (1997)).
- To evaluate whether a carrier may reclassify a service from common to private carriage, the test is "whether there is a public interest reason for the Commission to require facilities to be offered on a common carrier basis." *Tel-Optik Ltd.*, Memorandum Opinion and Order, 100 F.C.C.2d 1033, ¶ 29 (1985) ("*Tel-Optik*"); *see Commission Consideration of Applications under the Cable Landing License Act*, Notice of Proposed Rulemaking, 15 FCC Rcd 20789, ¶ 65 (2000) ("*CLLA NPRM*"). To answer that test, the Commission has "focused on the availability of alternative common carrier facilities" for the carrier's customers. *CLLA NPRM*, ¶ 65 (citing *Cable & Wireless*, Cable Landing License, 12 FCC Rcd 8516, ¶¶ 15-16 (1997)); *World Communications, Inc. v. FCC*, 735 F.2d 1465, 1474 (DC Cir. 1984) (a "key concern" in the Commission's public interest evaluation was "the adequacy of the remaining common carrier capacity to serve users' needs").
- FCC precedent applies these same legal principles in the context of a carrier seeking a discontinuance of common carrier DSL services. *Rhythms Links Inc. Section 63.71 Application to Discontinue Domestic Telecommunications Services*, Order, 16 FCC Rcd 17024, ¶ 8 (2001) (A key factor in determining whether to grant a Section 214 discontinuance certificate is "the availability of reasonable substitutes, and whether customers have had a reasonable opportunity to migrate").
- No data supports the proposition that ISPs that use BOC wholesale DSL services have available common carrier substitutes in the market today to which they could migrate. Thus, under the Act, no amount of "reclassification" would permit wholesale DSL deregulation until the actual marketplace supplies equivalent common carrier alternatives, i.e., a fully competitive marketplace.

### VI. Market Data Provides No Support for Deregulation of BOC Wholesale DSL.

- "The record indicates that no third parties are effectively offering, on a wholesale basis, alternative local loops capable of providing narrowband or broadband transmission capabilities to the mass market." *In the Matter of Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, Report and Order, 18 FCC Rcd. 16978, ¶ 233 (2003).
- As of December 31, 2004, ADSL and cable accounted for 92.9% of all high-speed lines in the U.S. and for 97.5% of all high speed lines in the residential and small business market. Of those ADSL lines, incumbent LECs have a 95.7% market share, with competitive LECs accounting for only 4.3%. FCC June 2005 High-Speed Report, Table 1 High Speed Lines and Table 3 Residential and Small Business High Speed Lines; Table 5 High-Speed Lines by Type of Provider as of December 31, 2004.
- In several states, monopoly or duopoly market power exists in many communities. For example, according to FCC data, in Arkansas, Kansas, Missouri, and Nebraska, 40% or more of the zip code areas are served by just one or two providers. It should be kept in mind that this percentage represents only the number of zip codes in a state with at least one high-speed line in service at any price, over any technology, at any level of quality. Accordingly, the FCC data likely overstate the level of competition (understate the extent of monopoly and duopoly market power) by including zip codes where one or more providers provides very few if any lines that are comparable in speed, price, or quality to the BOC or incumbent LEC service. FCC June 2005 High-Speed Report, Table 13 Percentage of Zip Codes with High-Speed Lines in Service as of December 31, 2004.
- "In California, SBC, and other incumbent LECs, continue to be the sole providers of broadband transmission service to nearly half of all residential customers in the state who have access to broadband service." Reply Comments of the People of the State of California and the California Public Utilities Commission, CC Docket Nos. 02-33, 95-20, 98-10, at 2 (filed July 1, 2002).
- "California does not believe that the current state of intermodal broadband competition can be described as effective, price constraining competition. At best, there currently is a duopoly of the incumbent LEC and the cable modem provider. But for many customers, *i.e.*, residential customers who do not have access to cable broadband and the majority of small and medium sized business customers, the incumbent LEC is the sole provider of broadband services. As a result of active regulatory actions in California, competitive LECs were able to provide DSL services in California earlier than elsewhere. However, in the last two years, much of that competition has evaporated as competitors offering DSL services in competition with the incumbent LEC have exited the market. While there were three major wholesale providers of DSL service in competition with Pacific Bell/SBC in 1997, currently only one major non-ILEC provides DSL service in California, and SBC/Pacific owns

- equity in that company." Reply Comments of the State of California and the California Public Utilities Commission, CC Dkt. 01-337 at 12 (filed April 22, 2002).
- "Forty-five percent of California's population with broadband access (including vast majority of San Francisco, San Jose, Long Beach, Oakland, and Stockton) can only get DSL service and cannot get cable modem service." Reply Comments of the State of California and the California Public Utilities Commission, CC Dkt. 01-337 at 17 (filed April 22, 2002).
- "According to an internal study by the CPUC staff, 35% of Californians live in communities where DSL is the only broadband service choice, while 21% of Californians live in communities that have neither cable modem nor DSL service. Only 30% of the state's population live in communities where both DSL and cable modem services are available. Because of DSL's lower upgrade cost and faster upgrade time frames, incumbent LECs may continue to dominate in providing broadband services in California." Reply Comments of the State of California and the California Public Utilities Commission, CC Dkt. 01-337 at 14-15 (filed April 22, 2002). See also, id., Appendix A (pie chart of DSL, cable and other in California).
- "Currently, one of three California residents live in areas where DSL service is the sole means of gaining broadband transport to an ISP. The incumbent LECs are the dominant, and in many cases, the exclusive provider of broadband service in California. Certain customers in discrete metropolitan areas may also obtain transport to the Internet from cable operators via a cable modem transmission service over cable facilities; however, in California, primarily because of the substantial cost in upgrading cable facilities to provide cable modem service, such service is limited to certain suburban areas with spotty coverage in downtown urban areas. Other transport methods of accessing the Internet use wireless, broadcast, and unlicensed spectrum technologies. These technologies for transport to the Internet, however, are not widely available to California customers as a viable alternative to either DSL service or cable modem service." Comments of California, CC Dkt. 02-33 at 5-6 (filed May 3, 2002).
- According to FCC data, fixed wireless and satellite hold insufficient market share (just 1.3%) to be considered serious competition to the incumbent LEC or cable operator in any relevant market. High-Speed Services for Internet Access: Status as of December 31, 2003, Chart 2 High-Speed Lines by Technology (rel. June 8, 2004) ("FCC June 2004 High-Speed Report"); see also, In the Matter of Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Report and Order, 18 FCC Rcd. 16978, ¶ 231 (2003), ("TRO"), partially vacated and remanded, USTA v. FCC, 359 F.3d 554 (D.C. Cir. 2004)("The record indicates that, at present, fixed wireless and satellite services remain nascent technologies, with limited availability, when used to provide broadband services to the mass market.").
- Broadband over power lines ("BPL") is not a significant entrant in either retail or wholesale markets. In a May 2004 survey of alternative broadband services, Verizon was able to list only two commercial roll-outs of BPL, at least one of which was not in Verizon territory. "Competition in the Provision of Voice Over IP and Other IP-

- Enabled Services," CC Dkt. No. 04-36, at A-13 (filed May 28, 2004) (referencing BPL roll-outs in Virginia and Ohio).
- Even if retail cable modem services were included in the relevant market for wholesale broadband transport (which they should not be) and/or providers of retail cable modem services were considered participants in the relevant wholesale broadband transport market (which would also be incorrect), the market still would not be competitive; rather the market so defined is at best a duopoly in which each duopolist holds market power: "In a **duopoly**, a market with only two competitors, supracompetitive pricing at monopolistic levels is a danger." FTC v. H.J. Heintz, 246 F.3d 708, 724 (D.C. Cir. 2001); In the Matter of Application of Echostar Communications Corp., Hearing Designation Order, 17 FCC Rcd. 20559, ¶ 100 ("courts have generally condemned mergers that result in duopoly"), ¶ 103 ("existing antitrust doctrine suggests that a merger to duopoly or monopoly faces a strong presumption of illegality") (2002); United States Dept. of Justice Antitrust Div. and Federal Trade Commission, 1992 Horizontal Merger Guidelines, 57 Fed. Reg. 41552, § 0.1 (1992) ("Merger Guidelines") ("where only a few firms account for most of the sales of a product, those firms can exercise market power, perhaps even approximating the performance of a monopolist . . . "). The Commission has held that "both economic theory and empirical studies suggest that a market that has five or more relatively equally sized firms can achieve a level of market performance comparable to a fragmented, structurally competitive market." In the Matter of 2002 Biennial Regulatory Review—Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, Report and Order and Notice of Proposed Rulemaking, 18 FCC Rcd. 13620, ¶ 289 (2003); see, In the Matter of Personal Communications Industry Ass'n, Memorandum Opinion and Order and Notice of Proposed Rulemaking, 13 FCC Rcd. 16857, ¶¶ 22, 23 (1998) (declining to find the CMRS marketplace sufficiently competitive where some of six potential competitive PCS licensees may not have begun to offer service).